IN THE

SUPREME COURT OF THE UNITED STATES

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No. ~~342~~ October Term, 1920.

JOHN SIMMONS COMPANY, Petitioner,

VS.

THE GRIER BROTHERS COMPANY, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Supplemental Brief for Respondent.

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This brief propounds two thoughts:

1. A subsequent decision of this Court in another action between other parties is no ground for modification of the final decree in this case by means of a bill of review.

2. The bill of review in this case is barred by lapse of the period of limitation.

I.

The Bill of Review is Grounded on no Sufficient Reason.

> "No decree shall be reversed, altered, or explained, being once under the great-seal, but upon bill of review; and no bill of review shall be admitted, except it contain, either error in law appearing in the body of the decree, without further examination of matters in fact, or, some new matter which hath risen in time after the decree."
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> *Lord Bacon's First Ordinance in Chancery*, January 29, 1618, quoted in Beames' Chancery Orders, Page 1.

A bill of review may be based on either of two grounds: first—error of law apparent on the face of the record without further examination of matters of fact; second—new facts discovered since the decree which should materially affect the decree and probably induce a different result.

Scotten vs. Littlefield, 235 U. S., 107, 111.

A subsequent decision of this Court is not a new "fact." Its force, if it has *any* force, upon a prior decision in another case, is to demonstrate that there was in that prior case an erroneous deduction or conclusion of law.

It seems to be Petitioner's contention that each decision of this court furnishes ground for bills of review

in all prior cases, no matter how ancient, if they were founded on conclusions inconsistent with the recent decision of this court. Petitioner's argument can lead to no other conclusion but that every judicial decision of an inferior court must hang in perpetual suspense against a possible contrary doctrine laid down by this court at any time in the future. That no such paradoxical system obtains in our jurisprudence was distinctly stated by this court in *Scotten vs. Littlefield*, 235 U. S., 407, where this court said (in an opinion by Mr. Justice Day) in answer to a precisely similar contention:

> "Such subsequent decision will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree, and probably requiring a different result. *Tilghman v. Werk*, 39 Fed., 680 (opinion by Judge Jackson, afterwards Mr. Justice Jackson of this Court); *Hoffman v. Knox*, circuit court of appeals, fourth circuit, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed., 481, 491 (opinion by Chief Justice Fuller)."

As was very well said by Justice Allen in *Miller vs. Tyler*, 58 N. Y., 477:

> "A contrary doctrine would lead to the absurd necessity of correcting and modifying all judgments, whether existing and in force or satisfied and fully executed, upon the enunciation by a court of superior authority of a doctrine in conflict with and legally subversive of the principles upon which they were rendered."

II.

The Bill of Review was Conclusively Barred by Lapse of Time.

A new decision is not a new "fact." The law remains as before; our understanding of it is bettered. So then, if a new decision furnishes grounds for correcting an earlier decree or judgment in another litigation, it must be because the new decision shows that there was "error of law" in the former decision. Assuming that upon such an excuse we can exhume the remains of buried controversies and re-write their histories, is there no limitation upon the process, or is every judgment and every decree, no matter how ancient, susceptible to such treatment?

We find the limitation clearly defined in a long line of decisions of this Court. It is settled law that a judgment or decree is subject to revision on bill of review only where that bill of review is filed within the period fixed by statute for an appeal from the decree. In other words, by analogy to the period of limitation which applies to appeals, the right to file a bill of review based upon an error of law is restricted to the same period after rendition of the decree complained of:

Thomas vs. Harvie's Heirs, 10 Wheaton, 146;
Kennedy vs. Bank, 8 Howard, 586, 609;
Whiting vs. Bank, 13 Peters, 6, 15;
Ricker vs. Powell, 100 U. S., 104;
Clark vs. Killian, 103 U. S., 766;
Ensminger vs. Powers, 108 U. S., 292;
Central Trust Company vs. Grant Locomotive Works, 135 U. S., 207;
Fraenkl vs. Cervecdo, 216 U. S., 295.

This being the rule, what results from applying it to the case at bar? This litigation was finally settled by a decision of the Court of Appeals of the Third Circuit on January 22nd, 1915, holding the reissue patent invalid (219 Fed., 735). At that time the period within which an appeal might be taken was one year, as fixed by the Act of March 3, 1891, Section 6, 26 Stat. L., 828. This decision of the Circuit Court of Appeals on January 22, 1915, was a final order, which with the permission of this Court could have been brought up on *certiorari* within one year. In pursuance of the decision and mandate of the Circuit Court of Appeals, the lower court entered a final decree January 5, 1916, (Transcript page 11). This decree adopted the judgment of the Circuit Court of Appeals that the re-issue patent was invalid, and thereupon dismissed the bill of complaint in so far as it charged infringement thereof. This also was not interlocutory, but was a final decree:

Smith vs. Vulcan Iron Works, 165 U. S., 518;
In re Sanford Fork & Tool Company, 160 U. S., 247.

Taking the most favorable possible view for the petitioner, the bill of review could be filed only within one year after the decree of January 5, 1916.

Before that decree, there had come, (November 9, 1915), a decision of the Court of Appeals of the Second Circuit, sustaining the reissue patent and showing a conflict between the Circuits, (228 Fed., 895.) Five days after the decree (January 10, 1916), this court granted a petition for a writ of *certiorari* from the decision in the Second Circuit. Yet the petitioner allowed his year to elapse without petitioning this court for a *certiorari*, without filing a bill of review and without taking any other action either during or after the term to preserve

his rights against the time when this court should have passed upon his patent. He made no move until January 26, 1918, when he first applied to the District Court for permission to file a bill of review. This was more than three years after the decision of the Circuit Court of Appeals and more than two years after the final decree in the District Court dismissing his bill.

We submit that the Bill of Review in substance showed no reason for disturbing the decree, and we further submit that if it had showed such reason it would have been too late and would have been barred by lapse of time.

Respectfully submitted,

DAVID A. REED,

Of Counsel for Respondent.

October 10, 1921.